Testimony of David Cole Before the
United States House of Representatives
Subcommittee on Immigration, Border Security, and Claims
of the House Committee on the Judiciary

Hearing on H.R. 2933, the "Alien Gang Removal Act of 2005."

June 28, 2005

INTRODUCTION

Thank you for inviting me to testify on H.R. 2933, titled the "Alien Gang Removal Act of 2005." I am a professor of constitutional law at Georgetown University Law Center, and a volunteer attorney with the Center for Constitutional Rights. I have litigated and testified often on issues of immigration law and constitutional rights. In my view, this bill, if enacted, would be unconstitutional in several respects. It would repeat some of the worst errors of the past in our treatment of foreign nationals, by failing to treat non-citizens as individuals, and by failing to accord them the basic human rights of due process and political freedom that we owe to all persons, and routinely insist upon for ourselves.

There is no question that gang crime is a serious matter that needs the country's attention. There are a wide variety of responses that governments might adopt to deal with the issue, from increased police presence in communities beset by gang crime, to criminal law enforcement targeted at the crimes that gang members commit, to providing alternatives to gangs through aftercare programs, sports, and social organizations, to relieving the poverty and desperation in the inner cities that leads too many young people to join gangs in the first place.

Immigration enforcement also has a role to play. But existing law affords immigration authorities sufficient tools to play such a role. Indeed, Michael Garcia, Assistant Secretary of U.S. Immigration and Customs Enforcement, recently testified before this subcommittee on ICE's Operation Community Shield, which had used immigration law to arrest more than 150 members of the notorious gang, MS-13.[1] Mr. Garcia did not suggest that existing law was insufficient to the task. In fact, he described the program as a success, and ongoing. Thus, there has been no showing that broader immigration powers are necessary to use immigration law to target foreign gang members who have

[1] Statement of Michael J. Garcia Before the House Committee on Judiciary Subcommittee on Immigration, Border Security and Claims, Hearing on Immigration and the Alien Gang Epidemic: Problems and Solutions," Apr. 13, 2005.

violated their status.

Many if not most "gang crimes," at least as that term is colloquially understood, are already "aggravated felonies" under immigration law. Any foreign national gang member convicted of an aggravated felony is already deportable, without regard to his or her membership in a gang. Thus, there is no bar on deporting gang members convicted of crimes.

What this bill does is empower the DHS to deport foreign nationals who have *never committed any crimes whatsoever*, and who have obeyed all of our laws, simply by claiming that the DHS has determined that they are members of designated street gangs. Such individuals are subject to mandatory detention and automatically rendered ineligible for asylum, withholding, and temporary protected status, even if they can show that they would be persecuted if they were returned to their country of citizenship. In short, they are treated even worse than aggravated felons, even if they have never committed a crime and pose no threat to anyone. This is guilt by association in its purest – and most clearly unconstitutional – form. It violates both the First and Fifth Amendments, both of which apply equally to citizens and foreign nationals residing here..

The bill's procedure for designating "criminal street gangs" also violates basic constitutional rights. The bill gives the Secretary of Homeland Security virtually unchecked power to blacklist domestic groups, through a secret process that provides no notice or opportunity to be heard to the designated group, and no meaningful opportunity to challenge the blacklisting decision once announced. The Secretary may designate as a proscribed "criminal street gang" any formal or informal group of three or more persons who have committed two or more enumerated "gang crimes." There are likely to be tens of thousands of such groups across the country, any of which could be designated by the Secretary. Once designated, any foreign national who immigration authorities deem to be a "member" of the group is deportable. There is no defense for those who did not know that the group was designated. There is no defense for those who never committed or supported a single criminal act. And the individual facing deportation has no right to challenge the validity of the designation.

This scheme violates the due process and freedom of association rights of gangs, gang members, and perhaps most importantly, those who are not in fact gang members but who a DHS official erroneously deems to be a member. The process contemplated by the bill provides no meaningful checks to ensure that innocent individuals and groups are not caught up in a potentially sweeping dragnet.

The "Alien Gang Removal Act of 2005" would expand the grounds of inadmissibility and deportability in two basic ways. First, it would make anyone whom DHS determines to be a member of a designated "criminal street gang" deportable and inadmissible, without more. Second, it would make members of *nondesignated* gangs who have been convicted of a "gang crime" deportable, and would render inadmissible any person whom DHS has "reasonable grounds to believe" is a street gang member and has committed or seeks to enter to commit "any unlawful activity."

The first approach, which relies on the blacklisting of proscribed gangs and requires no proof of criminal conduct by the foreign national whatsoever, violates both due process and the freedom of association. The second approach radically expands the grounds of inadmissibility and deportability, without any showing of need. Both approaches entail exceedingly harsh consequences in terms of eligibility for asylum, withholding, and temporary protected status, some of which violate our obligations under international law. I will address these aspects of the bill in turn.

I. THE BILL WOULD IMPOSE GUILT BY ASSOCIATION ON INDIVIDUALS WHO NEVER COMMIT OR SUPPORT ANY CRIMINAL ACTIVITY

Section 2(a) of the bill, which would add Section 212(a)(J)(i)(I)(bb), renders inadmissible any person who a consular officer or DHS officer has reasonable grounds to believe "is a member of a criminal street gang designated under section 219A." Section 2(b), which would add Section 237(a)(F)(i)(II), renders deportable anyone who "is determined by the Secretary of Homeland Security to be a member of a criminal street gang designated under section 219A." These provisions would impose guilt by association in its purest sense, for they would render individuals deportable and inadmissible not based on their own conduct, but solely on their association with others. A permanent resident who had never committed a single crime would be deportable under this provision for membership alone.

These provisions would prohibit all association with select disfavored groups, while granting executive branch officials effectively unreviewable discretion to select and designate the disfavored groups of their choice. These provisions do not punish crime, gang crime, or even material support to crime or gang crime. They punish membership per se, without more. They would render people deportable who had never committed an illegal act of any kind. Under this statute, a Cambodian refugee who was befriended by a Cambodian immigrant group designated a "criminal street gang" would be deportable even if he never committed any illegal act.

The Supreme Court has declared guilt by association "alien to the traditions of a free society and the First Amendment itself." *NAACP v. Claiborne Hardware*, 458 U.S. 886, 932 (1982). It violates both the Fifth Amendment principle that guilt must be personal, and the First Amendment right of association.

These provisions are materially indistinguishable from the McCarthy era laws that penalized association with the Communist Party. They substitute "criminal street gang" for "communist organization," but indulge in the same guilt by association. Yet despite specific findings that the Communist Party was engaged in criminal activity for the purpose of overthrowing the United States,[2]

[2] 50 U.S.C. § 781 (West 1991) (repealed 1993).

the Supreme Court consistently held that individuals could not be penalized for their Communist Party associations absent proof of "specific intent" to further the group's illegal ends.[3]

In *Scales v. United States*, 367 U.S. 203 (1961), the first case to establish the prohibition on guilt by association, the Supreme Court stated:

> In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity ..., that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.

Id. at 224-25. In other words, the Fifth Amendment forbids holding a moral innocent culpable for the acts of others.

Guilt by association also violates the First Amendment right of association. As the *Scales* Court explained, many groups have both legal and illegal ends. The right of association means that one who joins a group to further its legal ends cannot be punished for his membership. Only those who specifically intend to further the group's *illegal* ends may be punished. *Id.* at 229.

The Alien Gang Removal Act does not incorporate a specific intent standard. It appears to punish association regardless of intent, knowledge, or individual conduct. As such, it violates the prohibition on guilt by association.

Scales involved citizens, not foreign nationals. But the Supreme Court has said that "once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment. *None of these provisions acknowledges any distinction between citizens and resident aliens*." *Kwong Hai Chew*

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[3] *See, e.g.*, *United States v. Robel*, 389 U.S. 258, 262 (1967) (government could not ban Communist Party members from working in defense facilities absent proof that they had specific intent to further the Party's unlawful ends); *Keyishian v. Board of Regents*, 385 U.S. 589, 606 (1967) ("[m]ere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis" for barring employment in state university system to Communist Party members); *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966) ("a law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms"); *Noto v. United States*, 367 U.S. 290, 299-300 (1961) (First Amendment bars punishment of "one in sympathy with the legitimate aims of [the Communist Party], but not specifically intending to accomplish them by resort to violence").

v. Colding, 344 U.S. 590, 596 n.5 (1953) (emphasis added).[4]

Scales involved a criminal statute, not a civil sanction. But the Court has extended the prohibition on guilt by association to a wide range of civil sanctions, holding unconstitutional laws that on the basis of association: imposed tort liability, *Claiborne Hardware*, *supra*; denied a security clearance for employment in a defense facility, *Robel*, *supra*, denied employment as a public school teacher, *Keyishian*, *supra*; denied passports, *Aptheker v. Sec. of State*, 378 U.S. 500 (1964); *Kent v. Dulles*, 357 U.S. 116 (1958); and even denied students access to campus meeting rooms. *Healy v. James*, 408 U.S. 169 (1972).

The Alien Gang Removal Act's focus on membership in gangs also raises difficult issues of proof. It is one thing to prove membership in an established political organization like the Communist Party. Such organizations often have membership cards and lists, dues records, formally elected positions, and the like. But it is fairly certain that most street gangs do not have membership cards, dues payments, or official membership lists. "Membership" is likely to be a much more fluid concept. This is particularly likely given the bill's expansive definition of a "criminal street gang" as any group, *formal or informal*, of three or more individuals who have committed two or more gang crimes. Membership alone should never be a ground for deportation, but when one is dealing with membership in often amorphous informal gangs, this approach is even more likely to ensnare innocents.

In sum, the Alien Gang Removal Act indulges in unconstitutional guilt by association, imposing disabilities on individuals not based on their individual conduct, but based solely on their alleged association with others. We learned in the McCarthy era, when guilt by association was the modus operandi, that such tactics are overbroad, prone to widespread abuse, a direct infringement of constitutional liberties, and certain to harm many innocent people. There is no justification for repeating that history in the name of fighting gang crime, as current law permits authorities to arrest and deport all those foreign nationals who have actually committed an "aggravated felony," or have otherwise violated their immigration status.

II. THE DESIGNATION PROCEDURES VIOLATE DUE PROCESS

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[4] *See also Bridges v. California*, 314 U.S. 252 (1941) (applying First Amendment to resident alien); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent"); *Underwager v. Channel 9 Australia*, 69 F.3d 361, 365 (9th Cir. 1995) ("the speech protections of the First Amendment at a minimum apply to all persons legally within our borders"); *American-Arab Anti-Discrimination Comm. v. Meese*, 714 F. Supp. 1060, 1074-83 (C.D. Cal. 1989) (declaring unconstitutional a statute that made Communist affiliation a deportable offense), *affirmed in part and reversed in part on other grounds*,. 970 F.2d 501 (9th Cir. 1992).

The procedure by which groups would be designated under the bill raises a host of other constitutional concerns. The bill would give the Secretary of Homeland Security virtually unchecked power to blacklist groups at will. It affords prospective "designated gangs" neither notice nor the opportunity to be heard before being designated. Even after designation, the bill bars designated groups from seeking any administrative review until *two years after* they have been designated. And if they want to challenge their designation in court, gangs must file a lawsuit in the U.S. Court of Appeals for the District of Columbia, where review is limited to the one-sided administrative record created by DHS, affording the designated gang no opportunity to present evidence in its own behalf.

These designation procedures are evidently modeled on an existing procedure for designating "foreign terrorist organizations." 8 U.S.C. §1189. But those procedures have already been declared unconstitutional for failure to provide notice and an opportunity to be heard to any foreign terrorist groups with a presence in the United States (and therefore protected by due process). *National Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192 (D.C. Cir. 2001). In that case, the D.C. Circuit held that prospective terrorist organizations with a U.S. presence must be afforded notice and an opportunity to be heard before the administrative agency regarding their designation. Since criminal street gangs will presumably all be domestic (they must engage in conduct that violates federal or state law), they are all entitled to due process. Yet the bill provides the gangs no notice or opportunity to be heard on the issue of their initial designation.

Indeed, the bill appears to bar a designated gang from even approaching DHS about its designation until two years *after* the group has been designated. Sec. 2(c)(1) (adding Section 219A to 8 U.S.C. 1181 et seq.) Sec. 219A(4)(B)(ii)(II). A group is not permitted to petition for revocation of a designation until the "petition period" begins, which is two years after initial designation. *Id.* Thus, the bill violates due process by providing designated groups with no notice and no opportunity whatsoever to address DHS at a meaningful time on their initial designation.

Even after the two-year waiting period, a designated group may not challenge its *initial* designation as erroneous or unjustified, but may only show "that the relevant circumstances ... are sufficiently different from the circumstances that were the basis for the designation such that a revocation with respect to the gang is warranted." Sec. 219A(4)(B)(iii). This standard appears to render the administrative review process meaningless. If, on the one hand, a group was erroneously designated because it never committed any gang crimes, the petition process would provide no opportunity to correct the error, for the gang would be unable to show that "the relevant circumstances ... are sufficiently different from the circumstances that were the basis for the designation." And if, on the other hand, a group was initially properly designated under the law, because two of its members at some point committed two "gang crimes," those circumstances will not be "different" at a later time. Even if an initially designated group has engaged in no further crimes, the mere fact that it committed

two or more "gang crimes" at some point alone makes its designation appropriate under the law.[5] Thus, the administrative petition process not only comes two years too late, but appears to be a sham.

The bill would permit gangs to challenge their designation in court. But this process, too, is largely a sham. First, the bill requires any designated gang to file a challenge in the D.C. Circuit within 30 days of the publication of its designation in the Federal Register. It is fanciful to think that gangs, defined expansively under this bill as informal groups of three or more individuals who commit two or more gang crimes, are going to be in a position to check the Federal Register on a regular basis and hire an attorney to appear on their behalf in the DC Circuit. Moreover, even if a designated group were to read the Federal Register, find a lawyer, and file suit, the judicial review process does not permit the group to present any evidence of its own. Review is limited to the one-sided administrative record compiled by DHS without any notice to or input from the designated group. Thus, unless DHS were to designate groups without having any evidence that they had engaged in two gang crimes, its designation would be immune from challenge.

The person who is prosecuted for providing material support to a designated gang is barred from challenging the propriety of the designation. Thus, if the Secretary of Homelsnd Security were to erroneously designate an informal New York group of youth that had never engaged in gang crimes, but the designated group failed to file a challenge within the requisite 30 days, a foreign national subsequently charged with having belonging to that group could not defend himself by showing that the group never engaged in any gang crimes, and therefore should never have been designated in the first place. This prohibition raises serious due process and First Amendment concerns. There can be no question that individuals have a right to associate with groups that commit *no* criminal activity. Accordingly, an individual being punished solely for his associations certainly should have the right to make the case that his group engaged only in lawful activity, and should not have been proscribed. *McKinney v. Alabama*, 424 U.S. 669 (1976). Yet the statute expressly precludes just such a defense.[6]

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[5] One of the only situations in which circumstances might be different enough to warrant revocation under this standard would be where the group had disbanded and no longer existed as a group. But in that case, there would be no entity to petition for revocation.

The only other situation that might satisfy the standard for revocation would be one where a conviction previously relied upon to designate a group was overturned on appeal. But that would only be grounds for a revocation if the gang were designated on the basis of two crimes alone. Wherever DHS had evidence of more than two crimes in the gang's past, even an overturned conviction would not appear to require revocation.

[6] The Ninth Circuit recently upheld a similar bar on defendants charged with providing material support to designated foreign terrorist organizations. *United States v. Afshari*, 2005 U.S. App. LEXIS 11556 (9th Cir. June 17, 2005). However, the Court in that case rested its decision on three

As noted above, the designation procedure used here is modeled on an existing procedure for designating "foreign terrorist organizations." *See* 8 U.S.C. §1189. In my view, that existing procedure is also deeply problematic – beyond the constitutional infirmities that the D.C. Circuit has identified. But even if such a procedure were appropriate for foreign organizations engaged in terrorism that threatens national security, it does not follow that the same procedure is appropriate for domestic street gangs who have committed two relatively petty crimes.

First, the existing procedure is directed at *foreign* terrorist organizations, while this bill's procedure would be directed at *domestic* groups. As the D.C. Circuit has held, any group with a physical presence in the United States is unquestionably entitled to due process. *National Council of Resistance of Iran, supra*. Few foreign terrorist organizations have such a presence here, while all the groups that will be affected by this bill will have such presence. To give an executive official this kind of authority to blacklist domestic groups harkens back to the Attorney General's list of subversive organizations of the McCarthy period.

Second, the existing procedure is directed at *terrorist* organizations, defined as groups that engage in terrorist activities that undermine our national security. Such groups plainly pose a greater threat to the United States than the groups encompassed by this bill – literally any group of three or more individuals who have committed two "gang crimes," which, as noted below, could consist of burglaries, obstruction of justice, or misdemeanor assaults. To be designated as a "foreign terrorist organization," the Secretary of State has to determine that an organization's terrorist activities threaten the country's national security. No such finding is required for the designation of street gangs. It is enough to find that there are three individuals who have committed two burglaries or got into two bar fights.

Third, the discretion that this standard gives to the Secretary in designating is virtually limitless. The Department of Justice estimates that there are more than 25,000 gangs in the United States. And given the extremely expansive definition of "gang" used in this bill, the number of "formal or informal" groups of three or more persons who might fit the definition could well exceed 100,000. The Secretary has carte blanche to pick and choose among such groups, and his decision is inevitably likely to be selective and arbitrary. In essence, this bill would create an expansive licensing scheme for domestic organizations.

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factors: (1) the "material support" at issue was the provision of money, which the Court distinguished from speech protected by the First Amendment; (2) the designation involved sensitive foreign policy decisions; and (3) only *foreign* organizations could be designated. None of those factors is present here: (1) this bill punishes association per se, not material support; (2) the designation process involves no foreign policy determination; and (3) the bill affects domestic groups.

Thus, the procedure for designating "criminal street gangs" violates basic due process rights, and should be rejected. All of these problems can be avoided, as above, by targeting actual criminal activity, rather than targeting individuals based solely on their associations.

III. THE BILL'S TREATMENT OF GANG CRIMES WOULD RADICALLY EXPAND DEPORTATION GROUNDS FOR CERTAIN CRIMES WELL BEYOND THEIR ALREADY EXPANSIVE

The second way the bill expands the grounds of deportability and inadmissibility requires the DHS to show something more than mere association. Individuals who the DHS deems to be members of *nondesignated* street gangs are inadmissible if DHS also has reasonable grounds to believe that they have committed or seek to enter the United States to commit "a gang crime or any other unlawful activity." Sec. 2(a); amending 8 U.S.C. §1182. A foreign national is deportable if he is determined to be a member of a *nondesignated* street gang and has been convicted of a gang crime. Sec. 2(b), amending 8 U.S.C. §1227(a)(2).

These grounds also impose a form of guilt by association, because in many circumstances, individuals who commit the same offenses but are not associated with "street gangs" would not be subject to deportation or exclusion. In effect, this part of the bill radically expands the sorts of crimes for which some people may be deported. Some of the "gang crimes" defined in the bill are already aggravated felonies under existing law's already sweeping definition of that term.[7] But despite the expansive definition already given to "aggravated felonies," "gang crimes" under this bill would include many garden-variety crimes that are *not* aggravated felonies under current law. As such, these provisions radically expand the grounds of deportability and inadmissibility for garden-variety offenses.

Consider three of the crimes identified as gang crimes: burglary, obstruction of justice, and

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[7] The definition of "aggravated felony" for immigration law purposes has virtually no relation to the common-sense meaning of that term. The current law treats many misdemeanors as "aggravated felonies" if they trigger a sentence of one year. Thus, courts have ruled that misdemeanor convictions for shoplifting, assault, and theft of a video game worth $10 all constitute "aggravated felonies." *United States v. Christopher*, 239 F.3d 1191 (11th Cir. 2001) *(*misdemeanor conviction for theft by shoplifting, with 12 months suspended sentence is "aggravated felony"), *cert. denied*, 534 U.S. 877 (2001); *Erewele v. Reno*, 2000 U.S. Dist. LEXIS 11765 (N.D. Ill. 2000) (misdemeanor shoplifting with one-year suspended sentence); *United States v. Holguin-Enriquez*, 120 F.Supp.2d 969 (D.Kan. 2000) (misdemeanor assault with one-year suspended sentence); *United States v. Pacheco*, 225 F.3d 148 (2d Cir. 2000) (misdemeanor theft of a small video game with one-year suspended sentence), *cert. denied*, 533 U.S. 904 (2001)

crimes of violence. Under current law, such crimes are "aggravated felonies" only if the defendant is actually sentenced to a year or more of incarceration. Under this bill, such crimes would be deportable offenses for gang members so long as the crimes are "punishable by imprisonment for one year or more." The distinction between crimes that *actually receive* a one-year sentence and those *punishable* by a one-year sentence may seem technical. It is not. States routinely authorize punishment of up to one year for misdemeanors, but it is only the rare defendant who actually receives a one-year sentence for a misdemeanor conviction.

For example, under New York law, simple assault – the kind of charge that a garden-variety bar fight or street fight might trigger – is a Class A misdemeanor punishable by up to one year of incarceration. In 2004, 10,779 people were convicted of this charge in New York, yet only 349, about 3%, were sentenced to the maximum of one year of incarceration. The vast majority – about 70% – served no jail time at all. And the median sentence for the 30% who received any jail time was 89 days.[8]

Under current law, any foreign national who was among the 3% who actually received a one-year prison sentence might be deportable for having committed an "aggravated felony." Under this bill, by contrast, any foreign national among the 97% of defendants who do *not* receive a one-year sentence for misdemeanor assault would be deportable if they were deemed to be a member of any group, formal or informal, of three or more individuals who had committed two or more similar assaults in the past. This is a radical expansion of the grounds of deportation.

The inadmissibility standard is even more sweeping, for three reasons. First, to establish inadmissibility the DHS need not establish as a matter of fact that a foreign national is a member of a "street gang," but need only have "reasonable grounds to believe" that this is the case. Second, to establish inadmissibility the DHS need not show that the foreign national was convicted of any crime, but merely that the DHS has reasonable grounds to believe that he has committed or is likely to commit such an offense in the future. No conviction is needed. And third, inadmissibility is not limited to the expansive category of "gang crimes," but encompasses "any other unlawful activity," thus sweeping in the most petty of crimes.

Inadmissibility grounds are not infrequently broader than deportation grounds, in part because less is thought to be at stake for the typical entrant than for the foreign national already living among us, and in part because government officials often have to make admission decisions on less complete information than deportation decisions. But it is important to realize that inadmissibility grounds are used not merely to assess who may enter the country in the first place. They are also applied to permanent resident aliens every time they return from any trip outside the country. And they are used as eligibility thresholds for a variety of immigration benefits, including adjustment of status to permanent

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[8] *See* Exhibit A attached hereto.

resident.

IV. THE BARS ON ELIGIBILITY FOR ASYLUM, WITHHOLDING, AND TEMPORARY PROTECTED STATUS ARE UNWARRANTED, AND IN SOME CIRCUMSTANCES VIOLATE OUR INTERNATIONAL LAW OBLIGATIONS

The bill imposes especially harsh immigration consequences on all deemed deportable or inadmissible as gang members. Anyone who falls within the expansive grounds of inadmissibility and deportability is automatically subject to mandatory detention and rendered ineligible for asylum, withholding of deportation, and temporary protected status (TPS).

There is little justification for such harsh consequences. Foreign national gang members convicted of particularly serious crimes are already deportable, subject to mandatory detention, and barred asylum and temporary protected status, under the "aggravated felony" provisions of current immigration law. What this law does is extend such consequences to persons who have *never committed a crime in their life*, but are simply deemed to be members of designated street gangs, or are deemed members of nondesignated gangs who have been convicted of routine misdemeanors, such as simple assault, even if the criminal justice system sees no need even to impose any prison time for the offense.

The effect on withholding is most dramatic. Under current law, an alien is generally ineligible for withholding of deportation only where he has been convicted of an aggravated felony *and* has been sentenced to five years or more incarceration. 8 U.S.C. §1158(b)(2)(B)(I). Under this law, an alien would be rendered ineligible for withholding based solely on his association with a gang, and/or on the basis of a minor assault conviction that warranted no jail time whatsoever.

To receive asylum or withholding, an individual must show that he is likely to suffer persecution if sent back to his country of origin. To deny asylum and withholding and send a person back to likely persecution is a drastic step. To do so where the individual poses a direct threat to national security or is a hardened criminal is one thing; to do so on the basis of "membership" in a gang, without any evidence of criminal activity, or on the basis of a minor criminal charge that does not even warrant a day's incarceration is an entirely different matter.

Indeed, to deny eligibility for asylum or withholding to otherwise qualified foreign nationals based on nothing more than their perceived associations, and or a minor crime, violates our obligations under the Refugee Convention. Article 33 of the Refugee Convention provides as follows:

> Prohibition of expulsion or return ("refoulement")
>
> 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened

on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

A person deemed solely to be a member of a designated street gang, who has committed no crimes, cannot be returned to a country where he faces persecution. Yet under this bill, he would be. Similarly, burglary, obstruction of justice, or assault charges cannot under any reasonable definition be defined as "particularly serious crimes," especially where they are deemed by the criminal justice system to warrant no incarceration. Yet this bill would bar withholding, and send immigrants back to persecution, based on such petty crimes, and based solely on association.

CONCLUSION

Reducing gang violence is undoubtedly an important objective, although in general more a state and local than a federal responsibility. Using immigration law to deport violent gang members makes sense, as does using immigration law to deport violent foreign nationals who are not gang members. But the Alien Gang Removal Act goes far beyond the legitimate purpose of removing violent foreign nationals. It authorizes mandatory detention and deportation of persons who have never committed a single crime in their life, and who pose no threat to the community – simply on the basis of their perceived association with even "informal" groups. And it would send such foreign nationals back to countries where they are likely to be persecuted, again without any showing that their continued presence here poses any threat. At the same time, it radically expands the types of crimes for which foreign nationals can be deported, far beyond even the already expansive definition of "aggravated felonies" in current law.

As Michael Garcia testified recently, DHS and ICE are already engaged in an ongoing effort to use immigration law to fight gang violence. There is no evidence that the tools they already have at their disposal are inadequate to the task. This bill is accordingly premature at best. What's worse, in its zeal to fight gang violence it has lost sight of the problem – violent crime – and indulged instead in sweeping guilt by association, in violation of constitutional law and our international law obligations. This bill, if enacted, would resurrect the unwise and unconstitutional tactics of the McCarthy era, giving government officials broad discretion to punish individuals not for their own culpable conduct, but solely for their associations.

STATE OF NEW YORK - DIVISION OF CRIMINAL JUSTICE SERVICES

PL 120 MISDEMEANOR ASSAULT OFFENSES
NEW YORK STATE

DISPOSITION YEAR	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
TOTAL DISPOSITIONS	41859	44479	48996	51309	47295	47246	41214	44537	42465	42873
PROSECUTED, LOWER COURT	38983	42599	47081	48852	45474	45017	38890	41860	39129	38353
CONVICTED	9551	10342	10653	11228	10984	10947	10506	10647	9911	9738
--PLEA	9133	9984	10348	10891	10597	10558	10137	10314	9630	9442
--VERDICT	174	186	152	217	224	177	192	205	171	167
--UNKNOWN	244	172	153	120	163	212	177	128	110	129
DISMISSED	28389	31182	35296	36439	33226	32846	27288	30112	28122	27659
ACQUITTED	276	294	295	318	336	287	245	349	295	272
OTHER DISPOSITION	767	781	837	867	928	937	851	752	801	684
SENTENCES TO: PRISON	0	0	0	0	0	0	0	0	0	0
JAIL	3124	3382	3582	3624	3495	3660	3479	3624	3355	3320
TIME SERVED	718	818	792	859	808	729	784	702	707	727
JAIL + PROBATION	495	727	771	784	698	648	652	621	596	472
PROBATION	2308	2476	2509	2724	2639	2553	2506	2393	2183	1994
FINE	778	741	740	782	764	720	650	717	684	639
COND. DISCHARGE	1972	2038	2065	2274	2372	2430	2270	2435	2234	2260

	OTHER	33	56	50	61	63	41	24	36	37
42										
	UNKNOWN	123	104	144	120	145	166	141	119	115
284										
PROSECUTED, UPPER COURT		730	760	795	758	703	714	699	859	1056
1670										
CONVICTED		692	723	761	708	655	681	650	728	865
1041										
--PLEA		620	649	683	660	588	607	580	655	804
976										
--VERDICT		58	70	70	46	63	70	67	71	60
63										
--UNKNOWN		14	4	8	2	4	4	3	2	1
2										
DISMISSED		19	11	9	15	11	12	17	100	157
553										
ACQUITTED		4	3	3	2	3	3	1	3	9
21										
OTHER DISPOSITION		15	23	22	33	34	18	31	28	25
55										
SENTENCES TO: PRISON		0	0	0	0	0	0	0	0	0
0										
	JAIL	191	214	217	210	193	198	183	221	222
313										
	TIME SERVED	37	36	37	46	50	66	49	41	64
64										
	JAIL + PROBATION	81	83	91	105	73	76	66	66	94
92										
	PROBATION	263	277	290	237	241	229	237	250	332
291										
	FINE	17	21	20	28	16	9	17	14	16
16										
	COND. DISCHARGE	94	84	97	75	75	83	84	107	109
201										
	OTHER	3	4	1	0	3	3	2	2	3
5										
	UNKNOWN	6	4	8	7	4	17	12	27	25
59										
OTHER DISPOSITION-COURT UNKNOWN		2146	1120	1120	1699	1118	1515	1625	1818	2280
2850										
CONVICTION RATE (% OF DISPOSED)		24.5%	24.9%	23.3%	23.3%	24.6%	24.6%	27.1%	25.5%	25.4%

25.1%											
	INCARCERATION RATE (% OF CONV)	45.4%	47.5%	48.1%	47.2%	45.7%	46.2%	46.7%	46.4%	46.8%	
46.3%											
	% OF CONVICTION TO: FELONIES	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	
0.0%											
	MISDEMEANORS	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	
100.0%											
	LESSER OFFENSES	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	
0.0%											

SOURCE: COMPUTERIZED CRIMINAL HISTORY SYSTEM (AS OF 04/21/2005)

Jail Sentences - Top Disposition Charge PL 120

Misdemeanor Assault Convictions

New York State

Source: DCJS, Computerized Criminal History System (6/2005)

Days	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
1	0	4	5	5	3	1	7	3	3	4
2	3	4	1	2	4	2	1	2	3	0
3	11	5	8	18	10	11	13	6	5	25
4	3	3	1	2	4	7	2	1	3	3
5	34	32	38	41	23	39	48	28	33	30
6	1	6	7	3	3	4	2	8	5	5
7	25	30	36	34	24	36	41	27	28	35
8	3	10	1	4	2	9	4	4	3	2
9	3	2	4	3	3	4	9	8	2	6
10	82	99	79	65	63	82	88	75	72	95
11	0	0	0	2	1	0	1	0	1	1
12	4	3	3	5	6	1	11	6	3	7
13	0	0	1	2	2	1	2	0	1	1
14	6	2	2	3	5	5	5	6	5	1
15	116	122	122	135	110	115	120	125	110	124
16	2	3	1	3	1	0	0	2	0	2
17	1	1	0	1	1	0	1	2	1	2
18	3	1	2	2	0	2	3	2	1	7
19	1	0	1	0	2	0	0	0	0	0
20	71	88	91	74	60	78	83	86	86	109
21	4	14	7	8	8	6	5	7	6	9
22	1	2	0	0	1	2	0	0	0	0
23	0	0	0	1	1	0	0	1	2	1
24	3	5	5	4	1	3	3	4	4	3
25	9	6	5	8	11	9	7	5	9	9
26	0	0	1	0	1	0	1	3	0	1
27	5	0	0	4	1	1	1	1	1	1
28	13	6	7	10	8	2	6	9	5	4
29	1	1	1	0	3	1	0	3	0	0
30	474	490	572	534	558	589	553	589	496	513

31	1	2	1	7	4	3	5	9	7	3
32	1	0	0	1	0	2	0	0	1	0
33	1	1	0	0	0	0	3	0	1	1
34	0	1	1	1	1	0	0	0	1	1
35	7	3	3	4	2	3	4	4	7	4
36	1	2	1	4	2	2	1	1	2	0
37	0	1	1	1	0	0	0	0	0	0
38	1	0	1	0	0	1	2	0	0	0
39	0	2	0	1	2	1	0	0	0	2
40	13	14	11	11	17	13	10	12	6	10
41	0	0	0	0	0	0	0	1	1	0
42	8	5	3	6	4	4	7	0	1	1
43	1	0	1	0	2	1	2	0	0	0
44	0	0	0	0	0	0	0	0	1	0
45	181	207	200	193	176	213	185	190	220	231
46	0	1	0	0	0	1	1	0	0	0
47	1	0	0	1	0	0	0	0	0	2
48	0	2	2	2	0	0	2	0	1	1
49	0	0	1	0	2	1	0	0	2	0
50	4	6	7	6	9	3	5	3	6	7
51	0	0	0	0	0	0	0	1	0	0
52	0	0	1	0	0	1	1	0	1	0
53	0	0	1	0	0	0	1	0	1	2
54	2	0	1	1	0	0	0	0	0	2
55	3	1	1	0	1	1	1	1	1	0
56	0	7	7	7	4	5	4	6	1	1
57	0	1	1	0	1	0	0	0	1	0
58	0	0	0	0	0	1	2	0	2	1
59	1	0	0	1	1	1	0	1	1	3
60	403	400	419	414	415	448	441	409	390	410
61	6	8	11	12	6	11	7	14	18	9
62	2	0	0	0	0	0	0	0	0	2
63	1	1	2	2	0	2	0	1	1	1
64	0	0	0	1	1	1	1	0	0	0
65	2	1	1	0	2	0	2	2	2	1
66	0	1	1	0	1	0	1	1	0	0
67	0	0	0	0	0	1	2	0	0	2

69	0	0	1	0	0	0	1	0	0	1
70	6	0	11	1	10	6	8	6	3	5
72	0	0	0	0	1	0	0	0	0	0
73	0	0	0	0	0	1	0	0	1	0
74	0	0	0	0	1	0	0	0	1	0
75	18	28	21	33	25	26	35	33	22	28
76	0	0	0	0	0	1	0	0	0	0
78	1	0	0	0	0	0	0	0	1	0
79	1	0	0	0	0	0	0	0	0	1
80	7	4	11	1	3	5	5	4	4	3
81	0	0	0	1	0	0	0	0	0	1
82	0	0	0	0	0	1	0	0	0	0
83	1	0	0	0	0	0	0	0	1	0
84	9	8	3	5	2	1	3	3	1	0
85	2	0	1	1	2	2	0	2	1	0
86	0	0	1	0	0	1	0	0	1	0
87	1	1	2	2	0	1	0	0	0	2
88	0	0	2	1	1	3	0	0	1	0
89	52	67	62	69	49	63	62	55	51	42
90	515	574	561	617	589	639	557	614	540	551
91	2	1	0	0	0	1	0	0	1	1
92	27	26	45	40	48	47	56	55	53	39
93	0	1	0	0	0	0	0	0	0	0
94	0	0	1	0	0	0	0	0	0	0
95	0	1	0	0	0	1	1	0	1	2
96	0	0	0	1	0	0	0	0	0	0
98	0	0	0	1	0	0	0	0	0	0
99	0	0	0	0	0	1	0	1	0	0
100	4	4	2	2	4	4	2	3	5	5
101	0	0	0	0	0	0	0	1	0	0
102	0	1	0	0	0	0	0	0	0	0
105	0	5	1	1	0	8	0	3	1	3
110	0	0	0	1	0	0	0	0	1	0
111	0	0	0	0	0	0	1	0	0	0
112	1	1	3	0	2	2	0	0	0	1
115	1	0	0	0	0	0	0	0	0	0
117	0	0	0	0	0	0	0	1	0	0

118	0	0	0	0	0	0	1	1	0	1
119	0	1	0	2	0	0	0	0	0	0
120	28	25	29	28	32	22	31	42	44	30
121	0	0	0	0	0	0	0	0	2	0
122	110	116	133	151	134	128	128	137	146	120
123	0	0	0	0	1	0	0	0	0	0
125	0	1	0	0	0	0	0	0	0	0
126	0	0	1	0	1	1	1	0	0	0
127	0	0	0	0	0	0	0	0	1	0
129	0	0	0	0	0	0	0	0	1	0
130	0	0	0	1	0	0	0	0	0	0
131	0	0	0	0	0	0	0	0	1	0
132	0	0	0	0	1	0	0	0	1	0
134	0	0	1	0	0	0	0	0	0	0
135	1	1	2	2	0	3	0	1	2	2
136	0	0	0	0	0	1	0	0	0	0
137	0	0	0	0	0	1	0	0	0	0
140	0	1	2	2	1	1	2	1	0	0
142	0	0	0	0	0	0	0	1	0	0
145	0	0	0	0	0	1	1	1	0	2
150	5	4	7	5	6	6	2	8	5	13
151	0	0	0	0	0	0	1	0	0	0
152	0	0	0	0	0	0	0	0	1	2
153	52	53	50	53	57	45	40	56	49	60
154	0	0	1	0	0	0	1	1	0	0
158	0	0	0	0	0	0	0	0	0	1
159	0	0	0	0	0	1	0	0	0	0
160	0	0	1	1	3	1	1	1	0	1
163	0	0	0	0	1	0	0	0	0	0
164	0	0	0	0	0	0	0	1	0	0
165	0	2	1	0	2	2	2	0	1	1
168	0	0	0	0	1	0	0	0	0	0
169	1	0	0	0	0	0	0	0	0	0
170	0	1	0	0	0	0	0	0	0	1
173	1	0	0	0	0	0	0	0	0	0
180	23	28	38	40	40	44	28	25	28	33
182	0	1	1	3	0	1	1	0	0	3

183	352	407	424	432	439	429	361	432	381	362
184	0	1	0	0	0	1	0	0	0	0
187	1	0	0	0	0	0	0	0	0	0
188	0	0	0	1	0	0	0	0	0	0
190	0	0	0	0	0	0	0	0	0	1
192	0	0	1	0	0	0	0	1	0	0
195	0	2	0	1	0	0	0	0	1	0
196	1	0	1	0	0	0	0	0	0	0
200	1	1	1	1	0	1	0	0	1	0
204	1	0	0	0	0	0	0	0	0	0
210	1	0	0	1	2	1	2	4	1	1
214	23	16	22	29	29	23	27	28	20	25
215	0	0	0	0	0	0	1	0	0	0
220	0	1	0	0	0	0	0	0	0	0
221	0	0	0	0	0	0	0	0	1	0
224	0	0	1	0	0	1	0	0	0	0
225	0	4	1	1	1	0	0	1	1	1
226	0	0	0	0	0	0	1	0	0	0
227	0	0	0	0	0	0	0	1	0	0
228	0	0	0	1	0	0	0	0	0	0
230	0	1	0	0	0	1	0	0	0	0
234	1	0	0	0	0	0	0	0	0	0
238	0	0	0	1	0	0	0	0	0	0
240	3	0	2	3	3	4	5	7	2	2
244	38	36	47	53	47	39	39	50	47	48
245	0	1	1	0	0	0	0	0	0	0
250	0	0	1	0	0	0	0	0	0	0
252	0	0	0	1	0	0	0	0	0	0
260	0	0	1	0	0	0	0	0	0	0
270	6	3	3	7	6	4	5	6	9	4
274	0	2	0	0	0	0	0	0	0	0
275	113	130	149	125	130	141	126	136	146	125
280	0	0	0	0	0	0	1	0	0	0
285	0	0	0	0	0	1	1	0	0	0
291	0	0	0	0	0	0	1	0	0	0
300	2	1	2	4	2	1	2	0	1	4
305	18	36	19	38	27	31	35	33	34	38

315	0	1	0	0	0	0	0	0	0	0
326	0	0	0	0	0	0	0	0	0	1
330	1	1	0	0	0	0	0	0	0	1
336	10	6	8	6	6	8	8	9	4	9
346	0	1	0	0	0	0	0	0	0	0
360	1	1	1	0	3	0	4	0	2	7
364	2	0	0	0	2	1	1	0	0	1
365	329	366	428	411	401	363	363	411	389	349
Missing	23	16	10	4	0	6	1	0	1	2
Total	3315	3596	3798	3834	3688	3858	3662	3845	3577	3633